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fee of the highway, and to constitute property within the meaning of the constitution. *Story* v. *New York Elevated R. R. Co.*, 90 N. Y. 122; *Adams* v. *Chicago, etc., R. R Co.*, 39 Minn. 286; *Garrett* v. *Lake Roland, etc., Co.*, 79 Md. 277, *contra*. It is said to arise even though the highway is established after the grant of the abutting property, *Barnett* v. *Johnson*, 15 N. J. Eq. 481; and not to extend over private ways. *Dexter* v. *Tree*, 117 Ill. 532. While it is undoubtedly desirable in closely settled communities that abutters should have an easement of light and air over the highway, it is not entirely clear from what source the easement is to be traced. It has been suggested that it is an implied easement appurtenant to the land arising by virtue of an implied agreement that if the lot be purchased the owner shall be entitled to the open space above the street. The difficulty with this suggestion is that it in no way explains the acquisition of an easement when the establishment of the highway is subsequent to the grant of the abutting property, nor the limitation of the doctrine to land upon public, as distinguished from private highways. A consideration of the objects and incidents of the creation of public highways may place the matter in a clearer light than an attempt to argue from the analogy of easements over private land. A public highway is established to facilitate intercourse between the public at large and the abutting landowners, an object best effected by permitting the public to pass freely over the road, and by enabling the abutters to build to its edge. As the abutters require an easement of light and air if they build to the edge of the highway, such an easement would seem as essential to the general purposes of the highway as that of public travel. Both easements, therefore, should be regarded as natural incidents to the creation of the highway, arising simultaneously and by virtue of their relation to the objects of that creation. Cf. *Adams* v. *Chicago, etc., R. R. Co.*, 39 Minn. 286. Such a view will at least support the desirable results that have been reached, without doing violence to well-settled principles of the law of property.

ANTICIPATORY BREACH OF CONTRACT AS EXCUSE FOR NON-PERFORMANCE. — The usual statement of the doctrine of anticipatory breach is to the effect, that when one party to an executory bilateral contract expresses an intention not to perform, the other party may treat the contract as broken and sue at once, or may ignore the repudiation, in which case the obligations upon each continue effective. *Frost* v. *Knight*, L. R. 7 Ex. 111. Illogical as it is to make a breach of contract depend on the promisee's election, considerations of convenience furnish perhaps a justification. At least so much of the doctrine of anticipatory breach as gives the right to sue immediately, is firmly established. *Roehm* v. *Horst*, 178 U. S. 1; 14 HARVARD LAW REVIEW, 433, note 4. But the alternative proposition, that the repudiation if not immediately acted upon is inoperative, has received almost no direct adjudication, although usually asserted as *dictum* where the right to sue immediately is recognized. In a recent case, however, the Supreme Court of Georgia treating the rule as established by these *dicta* decides that a repudiation by the plaintiff is no excuse for a subsequent non-performance by the defendant, when it is not shown that the defendant has elected to treat the contract as broken by the repudiation. *Smith* v. *Ga. Loan, etc., Co.*, 39 S. E. Rep. 410. One other direct decision where the point was raised in a

slightly different way is in harmony. *Dalrymple* v. *Scott*, 19 Ont. App. 477.

A doctrine resulting in such decisions as these is objectionable. The principle of fairness, introduced under the terms of implied conditions, excusing one party from performance on the *actual* failure of the counter-performance, applies with equal force when it appears that there is *going to be* such failure. *Ripley* v. *M'Clure*, 4 Exch. 345; *Lowe* v. *Harwood*, 139 Mass. 133. There is also the well-recognized rule that forbids a plaintiff increasing the damages by a useless performance after the defendant has expressed his intention not to carry out the contract. *Clark* v. *Marsiglia*, 1 Denio, 317; *Chicago, etc., Co.* v. *Barry*, 52 S. W. Rep. 451 (Tenn.). These considerations of fairness are not only in evident conflict with the doctrine of the principal case, but they are in accord with the commercial understanding. Where one party repudiates the contract, no course is more natural than for the other to remain passive, either hoping for a future fulfilment of the agreement, or looking for an opportunity to contract elsewhere. This passivity ought not to render the repudiation, if it still continues, inoperative as a defence. Such a course is also advantageous to the one who repudiates, as he may retract his repudiation, unless it has been acted upon. *Nilson* v. *Morse*, 52 Wis. 240. A further difficulty is that courts leave us quite in the dark as to what act, if any, other than immediately bringing suit, will be sufficient to render the repudiation operative. It would seem wise, therefore, not to extend the doctrine of anticipatory breach beyond its first proposition, the immediate right to sue. If the injured party elects not to sue at once, the ordinary rules of contract should govern, and the repudiation should be an excuse for his subsequent non-performance. It is therefore unfortunate that Lord Cockburn's suggestion of compelling the defendant to sue at once or to continue to perform should have been recently strengthened by an actual decision.

VALIDITY OF SPECIAL ASSESSMENTS UNDER THE FOURTEENTH AMENDMENT. — It was thought by many that a deathblow had been dealt to the "front foot rule" by the Supreme Court in the important case of *Norwood* v. *Baker*, 172 U. S. 269. The court asserted that the exaction of an assessment in substantial excess of the special benefits was, to the extent of such excess, a taking of property without compensation, and was supposed to have decided in consequence, that a rule of apportionment which does not provide for an inquiry into special benefits is in violation of the Fourteenth Amendment. This interpretation of the decision is vigorously maintained by Mr. Justice Harlan in the dissenting opinion of a subsequent case. The majority of the court, however, while professing not to overrule *Norwood* v. *Baker*, seem to justify it on its peculiar facts, and in upholding the validity of the "front foot rule" to repudiate its supposed doctrine. *French* v. *Barber, etc., Co.*, 181 U. S. 324. A recent case is interesting as recognizing that this modification leaves little of the doctrine. *Zehnder* v. *Barber, etc., Co.*, 108 Fed. Rep. 570 (Cir. Ct. Ky.). In this case, a temporary injunction, which had been granted on the authority of *Norwood* v. *Baker*, was dissolved in conformity with *French* v. *Barber, etc., Co.*

An historic clause like the Fourteenth Amendment should be con-